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Issue Date: 27 June 2003

CASE NO.: 2002-LHC-1323

OWCP NO.: 07-101818

IN THE MATTER OF

GEORGE W. LEA,
Claimant

v.

CERES GULF, INC.,
Employer

APPEARANCES:

William S. Vincent, Jr. Esq.,
On behalf of Claimant

W. Chad Stelly, Esq.,
On behalf of Employer

Before: CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et. seq., brought by George W. Lea (Claimant) against Ceres Gulf, Inc., (Employer). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on April 24 and 30, 2003, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their respective positions. Claimant testified, called vocational expert, Ed Ryan, and introduced 4 exhibits which were admitted including medical records of Drs. Stuart Phillips and John J. Watermeier; deposition of Dr. Phillips

and a psychological evaluation of Claimant by clinical psychologist, Dr. Nathanael Mullener.¹ Employer called medical expert, Dr. Gordon Nutik and introduced 11 exhibits which were admitted including DOL form LS-202, medical records from Drs. Gordon Nutik, Harry Hoerner, Malcom Friedman, Ray J. Haddad, Essen Elmorshidy and Hotel Dieu Hospital and Tulane University Medical Center, vocational reports from Jennifer Palmer & Co., and Claimant's IRS records.²

Post-hearing briefs were filed by the parties.³ Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant was injured on August 22, 1985, in the course and scope his employment with Employer during which there was an Employer/Employee relationship.
2. Employer was advised of the injury on August 27, 1985.
3. Employer filed a Notice of Controversion on July 13, 1992.
4. An informal conference was held on September 13, 2001.
5. Claimant's average weekly wage at the time of his injury was \$1,144.12.
6. Employer paid Claimant the following disability payments:
temporary total disability from August 22, 1985 until May 16, 1998

¹ References to the transcript and exhibits are as follows: trial transcript- Tr.____; Claimant's exhibits- CX-____, p.____; Employer exhibits- EX-____, p.____; Administrative Law Judge exhibits- ALJX-____; p.____.

² Claimant objected to the vocational report of Douglas Kuylen (EX-8), absent, live, or deposition testimony. The parties were given additional time until June 23, 2003, in which to procure Mr. Kuylen's testimony but failed to do so. However, I have decided to accept EX-8 to provide a complete picture of rehabilitation efforts on behalf of Claimant.

³ Claimant submitted a 15 page, double space brief on June 16, 2003. Employer submitted a 31 page, double space brief on June 23, 2003.

at the maximum rate of \$579.66 based upon an average weekly wage of \$1,144.12.; and permanent ,partial disability from May 17, 1988 to present at the maximum rate of \$579.66.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Nature and extent of disability from August 1, 2000 to present, i.e, whether Claimant has been either permanently and totally disabled or permanently and partially disabled from August 1, 2000 to present and continuing.
2. Compensability for an alleged back injury.
3. Employer's entitlement to Section 8 (f) relief.
4. Claimant's residual wage earning capacity.
5. Date of maximum medical improvement.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant is a 63 year old male born on April 28, 1940. (Tr. 78). Claimant completed the 9th grade, but has only borderline intelligence with spelling, reading, and math performance at the second, fourth, and seventh grade levels, respectively.⁴ (CX-5, Tr. 108). Before becoming a longshoreman in 1969, Claimant drove a truck and worked as a potato bagger and rice grain mill employee. From 1969 to his accident in 1985, Claimant worked as a longshoreman. On August 22, 1985, while handling and stacking loose boxes of palletized paper tape weighing between 80 or 90 pounds in a ship hole, Claimant lost his footing as the surface on which he was standing gave away. Claimant fell a distance of about 10 feet but continued working for about 45 minutes at which time he went to lunch. During the lunch break, Claimant's back stiffened to the point he could not bend over. Despite this problem Claimant finished his shift and went home only to experience additional back problems the following morning requiring him to remain in bed, seek chiropractic care, and stop work.. (Tr. 78-84).

⁴ Psychological testing by Dr. Nathanael Mullener on December 19, 2002, showed the following I/Q results: verbal-76; performance 73; and full scale-72. Wide Range Achievement testing showed Claimant spelling at a second grade, reading at the fourth grade, and performing arithmetic at the seventh grade levels.

On August 27, 1985, Claimant reported the accident to Employer. When informed that Employer did not believe in chiropractic care, Claimant chose and Employer authorized, treatment by Orthopedist, Dr. Essen Elmorshidy. (Tr. 84,85; EX-1). Dr. Elmorshidy treated Claimant from September 12, 1985 until July, 1987, during which time he saw Claimant on at least 24 separate occasions.⁵ (Tr. 86-88). On the first visit of September 12, 1985, Claimant complained of low back pain with numbness in the left leg. The exam shows paraspinal muscle spasm, tenderness of the lower lumbar spine and left sciatic notch, straight leg raising of 45degrees on the left and 65 degrees on the right, weakness of dorsiflexion of the left big toe, diminished sensation on the dorsum and outer aspect of the left foot, and slight diminished reflexes of the left ankle. Dr. Elmorshidy admitted Claimant to Methodist Hospital where he underwent pelvic traction, therapy, and a CT scan showing a bulging or herniated disc at L4-5. (Tr. 85-88). Claimant was discharged on September 28, 1985, but through December, 1985, continued to exhibit muscle spasm, tenderness, and limited range of back motion with positive straight leg raising. (EX-10, pp. 4,5). As of the last visit of July 1, 1987, Claimant had continued complaints of intermittent back and leg pain with some tenderness and spasms and a positive straight leg raising at 70 degrees. Dr. Elmorshidy diagnosed Claimant with lumbar disc syndrome (herniated disc at L4-5, L5-S1) as confirmed by myelogram of May 6, 1986 and lower extremity EMG, and found him to be unable to return to work. (EX-10, pp.16-18, 35).⁶

Claimant next sought and obtained approval from Employer for treatment by Orthopedist, Dr. Ray J. Haddad who saw Claimant on 12 occasions between August 27, 1987 and February 5, 1990.⁷ During this period, Claimant continued to complain of low back and left leg radicular pain for which Dr. Haddad provided conservative care including use of Flexeril and Norgesic. (EX-7). Dr. Haddad opined that Claimant had a ruptured disc at L4-5 with a 15 to 20 percent whole body impairment and recommended surgery which Claimant refused. On March 3, 1988, Dr. Haddad informed the adjuster that Claimant had declined surgery, and thus, he placed him at maximum medical improvement. In a May 24, 1988 letter to the adjuster, Dr. Haddad stated that Claimant had a 15 to 20 percent permanent partial disability. (EX-7, pp. 3,5).

Following Dr. Haddad's death in 1990, Claimant sought and obtained approval for treatment by Orthopedist, Dr. Henry Hoerner. Dr. Hoerner saw Claimant on 42 separate occasions between

⁵ Dr. Elmorshidy saw Claimant on September 17, October 17, 29, November 5, December 20, 30, 1985; January 9, 30, February 20, March 13, April 7, 28, May 29, June 6, July 10, August 12, September 23, October 14, November 6, 1986; January 8, February 5, March 19, April 16, May 28, June 9, July 1, 1987. Dr. Elmorshidy ceased medical treatment in July 1987 due to an unspecified injury.

⁶ Dr. Elmorshidy also diagnosed Claimant with subacromial bursitis of the right shoulder. The parties did not allege this condition to be a disabling impairment related to the August 22, 1985 injury.

⁷ Dr. Haddad saw Claimant on August 27, 1987; February 1, March 2, May 16, June 27, and Oct 12, 1988; February 20, April 17, September 18, November 20, 1989; February 5, 1990.

February 28, 1990 and August 29, 1999, during which time period he provided conservative treatment for a lumbosacral muscular ligamentous strain with probable disc herniation.⁸ During this treatment, Dr. Horner assigned various work related restrictions limiting Claimant to light duty, non-longshore work involving no heavy lifting or long periods of standing, walking, or climbing on March 8, 1990; lifting no more than 35 to 40 pounds with avoidance of long periods of standing, walking, climbing, bending, squatting, stooping, and crawling on September 18, 1992; and light to sedentary work from March 17, 1993 through August 24, 1999. (EX-3, pp.4, 23, 26). As of the last visit on August 24, 1999, Claimant still had some lower back pain but with the help of medication was experiencing less discomfort with no leg pain. An exam of the back revealed no muscle spasm with slight tenderness to palpation and restricted motion and no neurological deficits. (EX-3, p. 48).

Following Dr. Hoerner's retirement, Claimant sought medical care from Orthopedist, Dr. Stuart Phillips who saw Claimant on July 31, October 31, 2000; April 19, July 31, and November 8, 2001, and June 20, and October 15, 2002. On the initial examination of July 31, 2000, Claimant presented with complaints of moderate low back pain radiating into the left lower left leg and foot with occasional numbness. According to Claimant, pain increased with prolonged sitting and standing. The exam showed a 25% loss of lumbar motion (flexion, extension, and lateral bending). There was moderate lumbar spasms bilaterally with tenderness at L4-L5, positive straight leg raising. X-rays showed dynamic spondylolisthesis at L4-5, bilateral degenerative arthritis in the hips, traumatic degenerative arthritis in the back. (CX 2,p.2).

At the October 31, 2000 exam, Claimant complained about persistent back pain with tenderness at L4-5, marked paralumbar muscle spasm, 30% loss of lumbar flexion, positive straight leg raising. Dr. Phillips opined that Claimant had chronic pain syndrome as a result of a traumatic injury with need for continued care in the future. On the next visit of April 19, 2001, Claimant's condition had worsened with x-rays showing marked degeneration of the lumbosacral joint with pseudo spondylolistheses at L4-5 resulting in dynamic instability. Subsequent examinations noted similar results with Claimant continuing to voice similar pain complaints. On the last visit of October 15, 2002, Claimant voiced similar complaints of moderate lumbar pain and stiffness with intermittent radiating pain in the lower extremity with pain relief due to medications. (CX-2). Throughout this treatment, Dr. Phillips found Claimant's condition to be permanent, rendering him unable to perform any type of work.

Following Dr. Phillips' retirement in 2003, Claimant sought treatment from Dr. John J. Watermeier, who saw Claimant on March 24, 2003. At this visit, Claimant complained of continuing

⁸ Dr. Hoerner saw Claimant on February 28, March 29, May 10, June 21, August 7, September 18, October 30, December 20, 1990; February 21, April 16, May 28, July 17, September 5, November 7, 1991; February 11, April 9, June 2, July 28, September 21, 1992; January 19, March 16, May 27, July 21, 1993; February 3, June 16, 1994; June 6, August 29, December 12, 1995; March 7, June 25, September 19, 1996; April 16, August 6, November 4, 1997; February 17, April 28, July 28, November 3, 1998; February 3, May 25, and August 29, 1999.

back pain, but only mild discomfort, with a lumbar examination showed moderate tenderness and muscle spasm with range of motion limited to 40 to 50 percent in forward flexion, backward extension, and lateral rotation. (CX-3).

During Claimant's treatment process, Employer required Claimant to be evaluated by Orthopedist, Dr. Gordon Nutik on 7 separate occasions: October 29, 1985; July 15, 1986; January 16, 1987; July 6, 1987; June 26, 1996, and November 20, 2002. (EX-2). On the first exam of October 29, 1985, Claimant related the events of August 21, 1985 and his subsequent treatment by Dr. Elmorshidy while complaining of sharp, intermittent mid and lower back pain radiating into the left lower extremity. The exam showed pain to palpitation over the fifth lumbar vertebra but no muscle spasm, limited lateral bending (50% on the left side and 66% on the right) limited rotational motion (66% of normal); decreased sensation to light touch and pinprick about the medial aspect of the left thigh and foot. X-rays showed narrowing of L4-5 disc space without evidence of hypertrophic changes, spondylolisthesis, spina bifida or sacralization. Dr. Nutik opined that Claimant had some narrowing at L4-5 but only mild mechanical restriction of low back motion with equivocal findings resulting in a diagnosis of lumbar strain. (EX-2, pp. 1-3). On the subsequent exam of July 15, 1986, Claimant voiced similar complaints, but Dr. Nutik found no evidence of any herniated disc or nerve root involvement, but concluded after reviewing Claimant's previous CAT scan and myelogram, that Claimant had underlying narrowing or disc disease at L4-5 and recommended retraining for lighter work.⁹ (EX-2, pp. 4, 5).

On the January 16, 1987 visit, Claimant presented with similar pain complaints, but denied numbness of the lower extremities. The clinical exam revealed no objective findings of any back or neurological impairment and recommended Claimant return to work with only a 75 pound lifting restriction. (EX-2, pp. 10, 11). On the July 6, 1987 visit Claimant renewed former back complaints. The exam revealed inconsistent findings with restricted range of motion in one position and normal range of motion in other positions, and negative sitting stretch tests, but positive straight leg raising. Dr. Nutik opined that Claimant's symptoms were related to early disc disease at L4-5 and possibly L5-sacral levels and recommended rehabilitation to lighter type work. (EX-2, pp. 12-14). On the December 17, 1987, visit Claimant demonstrated persistent limitation of low back motion while voicing continued back pain complaints. Dr. Nutik opined that Claimant had a disc bulge at L4-5 and possible a posterolateral disc protrusion or herniation without neurologic involvement and recommended no moderate or heavy work and no physical therapy or chiropractic adjustment. (EX-2, pp. 15-17).

On June 26, 1996, Claimant underwent a sixth examination by Dr. Nutik. The exam showed Claimant using a cane and walking with a limp, favoring the left lower extremity. Heel and toe walk was weak on the left. Claimant exhibited similar clinical findings as he had on the December 17, 1987

⁹ On December 16, 1986, Dr. Nutik in a letter to the adjuster, noted that he had reviewed Claimant's EMGs which showed S1 nerve root pathology, but concluded there was no evidence of nerve compression or disc herniation. (EX-2, pp. 7, 8).

exam. Dr. Nutik diagnosed chronic lumbar strain, found Claimant at maximum medical improvement, and restricted him to light work activities avoiding excessive bending and lifting over 20 pounds.

On the seventh and final examination of November 20, 2002, Claimant continued to voice similar complaints of low back pain which he described as sharp, intermittent, worsened by bending over too much. Pain radiated occasionally to the left thigh and calf and occasionally giving out of the left lower extremity. Claimant had restricted range of motion but no muscle spasm, normal neurological findings, and negative stretch and Laseque tests. Dr. Nutik noted that Claimant was deconditioned and capable of only sedentary to light work activities with occasional lifting of 15 pounds, frequent lifting of 5 pounds, avoiding excessive bending or stooping or ladder climbing and frequent alteration of sitting and standing positions. (EX-2, pp. 21-23).

B. Claimant Witness Testimony:

Claimant's testimony dealt with his work background, injury of August 21, 1985, medical treatment, symptoms, and limitations.¹⁰ After summarizing his medical treatment and work background, Claimant testified that despite conservative care and use of various medications, his condition worsened such that he cannot lift even his grandchildren weighing 25 pounds, but rather, is limited to light objects. Sitting is limited to 1 to ½ hours with walking restricted to no more than 1 ½ miles. On occasion his left leg will go out requiring use of a cane to balance himself. Besides medication, Claimant relieves back and leg pain by lying on the floor and propping up his head and legs. Hot morning showers also provide some relief. (Tr. 95-102,109).

Claimant admitted that he could work but only on an occasional basis, amounting to two or three days out of five per week, during the summer time when, he experiences good days of minimal discomfort. In the winter because of rain and cold, Claimant is limited to one day a week. (Tr. 103, 110, 111). Claimant also admitted that Dr. Elmorshidy told him he could not work on the waterfront, but that he could do some type of work which was confirmed by Drs. Haddad and Nutik. (Tr. 113, 114). Claimant's activities outside the home consist of driving his granddaughter to and from the nursery, occasional grocery shopping and house cleaning, limited grass mowing, occasional visits to the Sanchez Elderly Center, and weekend two hour driving trips to his home in Mississippi. (Tr.104, 114-118).¹¹

¹⁰ Claimant briefly described his treatment at Tr. 89-92.

¹¹ During the hearing Employer's Counsel attempted to introduce a video tape of Claimant taken the afternoon before the hearing for impeachment purposes. Because the tape was not disclosed to Claimant's Counsel prior to the hearing, as had been requested during the discovery process and the tape contained both potential impeachment and substantive evidence, I rejected the exhibit in accord with *Chaisson v. Zapata Gulf Marine*, 988 F.2d 513 (5th Cir. 1993) (Tr. 135-145, Employer proffer 1). Employer also introduced a law suit filed by Claimant on November 27, 2000, alleging exposure to asbestos by various employers resulting in asbestosis

Claimant also admitted that he considers himself retired, and thus, has not actively sought employment, although, on occasion in the past, he applied for jobs recommended by vocational rehabilitation counselors. (Tr. 105-108, 119-122). Currently Claimant receives social security disability benefits of \$1282 per month, retirement benefits of \$760 per month and longshore disability benefits of \$1159.32 every two weeks. (Tr.123, 124). Claimant's current treating physician is Dr. John J. Watermeier who last saw Claimant on March 24, 2003. On exam, Claimant demonstrated moderate tenderness and muscle spasm with decreased lumbar lordotic curve, 40 to 50 % range of back motion, moderate pain on straight leg raising in both sitting and lying down positions with a diagnosis of lumbar spinal stenosis. (CX-3).

Claimant introduced the deposition of Dr. Phillips who testified about his treatment of Claimant beginning with the initial examination of July 31, 2000 which revealed loss of back motion, bilateral muscle spasm and positive straight leg raising with x-ray evidence of spondylolisthesis at L4-5, and degenerative arthritis of the hips related to trauma (Claimant's workplace accident) by history. (CX-4, pp. 51, 52).¹² As a result of his exam, Dr. Phillips opined that Claimant was unable to work on a sustained and consistent basis due to lumbar instability which became worse with repetitive bending and rendered Claimant unable to sit or stand for long periods of time. (CX-4, pp.19-22). Dr. Phillips testified that Claimant may be able to do part time work if allowed to sit or stand intermittently, but found Claimant's condition to have worsened during his treatment, as evidenced by increased stiffness and pain in cold weather, muscle spasms with additional spinal deterioration and disc slippage. (CX-4, pp. 23-36).

Claimant also called Vocational Rehabilitation Counselor, Edward Ryan. Ryan testified that he interviewed Claimant on December 19, 2002 and after reviewing Claimant's medical records and considering: (1) his own testimony, wherein Claimant limited himself to standing 1 hour, walking a mile, sitting 30 to 45 minutes, lifting 25 to 30 pounds with a need to lie down 1 to 2 days per week in the summer, and 2 to 3 days per week in the winter, due to severe pain; (2) Dr. Mullener's psychological testing; and (3) the medical restrictions set forth in Dr. Nutik's June 30, 1996 and November 20, 2002, resulting in an ability to lift 15 pounds occasionally and 5 pounds frequently with avoidance of excessive bending or stooping or ladder climbing and frequent changes between sitting and standing, there were no jobs Claimant could perform on a competitive basis. (Tr. 155-165).

Concerning the Labor Market Survey of December 8, 1988, and the jobs identified by Vocational Rehabilitation Counselor, J. Carol Murrell, which included rag cutter, textile machine operator, gate guard or security watchman, bridge toll collector, Claimant would not be able to

and lung cancer at various job sites while Claimant performed longshore duties. While admitting he was short winded, Claimant denied having either asbestosis or lung cancer. (Tr. 128, 129, 148-153; EX-11).

¹² Dr. Phillips treated Claimant on July 31, October 31, 2000; April 19, July 31, Oct 12, November 8, 2001; June 20, and October 15, 2002.

perform these jobs on a sustained basis, if he (Ryan), considered only the testimony and limitations set forth by Drs. Phillips and Nutik, because all these jobs were in the light range requiring lifting up to 20 pounds. In addition, Claimant would not be able to perform any of the jobs identified by Vocational Rehabilitation Counselor, Douglas A. Kuylen's December 26, 2002 survey, which included rag cutter, parking lot cashier, security watchman, shuttle bus driver, bridge toll collector, parts inspector, packaging /inspector, textile material marker and textile bundler because these were also light jobs. (EX-8, Tr. 166-168). In essence, Mr. Ryan found Claimant unemployable because of the above lifting restrictions set forth by Drs. Phillips and Nutik and Claimant's need to remain at home several days per week. (Tr. 169).

C. Employer Witness Testimony:

Employer called one witness, Orthopedist, Dr. Gordon Nutik who testified regarding his examinations of Claimant on October 29, 1985; July 15, 1986; January 16, July 6, and December 17, 1987; June 26, 1996 and November 20, 2002. The substance of those exams was discussed infra at pages 5 and 6 of this decision. In addition to what appears there, Dr. Nutik attributed the 25 % loss or narrowing of disc space to a long standing degenerative condition pre-dating Claimant's August 21, 1985 accident (Tr. 13-15). On the exam of July 15, 1986, Claimant voiced similar complaints and asserted a need to use a cane to avoid falling. There was no neurological deficits, atrophy, or herniations, but limitation of lateral bending to 66 degrees of normal. Claimant had difficulty heel and toe walking and walked with a limp. (Tr.16, 17, 32).

On the third examination of January 16, 1987, Claimant voiced similar complaints and had no neurological deficits except decreased sensation in the left foot with no evidence of loss of reflexes, or atrophy. On the third, fourth, and fifth exams of January 16, July 6 and December 17, 1987, Claimant had similar complaints but noted inconsistent straight leg raising and sitting stretch tests on the July 6 test and opined that there was a possibility of symptoms magnification and attributed Claimant's complaints to degenerative disc disease. (Tr. 17-22).

On the July 26, 1996 visit, Claimant told Dr. Nutik he was walking up to a mile a day and could on occasion, cut about 10 to 20 feet of grass, take out the garbage, go to the grocery store and carry bags weighing less than 25 to 30 pounds. Claimant continued to have intermitted back pain, used a cane to prevent falling, and had degenerative spinal changes with bony spurs on the acetabulum bilaterally. Dr. Nutik opined that Claimant had chronic lumbrosacral strain and limited him to lifting 20 pounds. (Tr. 23-27). On the final exam of November 20, 2002, Claimant said he could walk 30 minutes or a mile three to 4 times per week, and continued with the same pain complaints, and physical exam showing degenerative spinal disease which limited Claimant to light to sedentary work. (Tr. 28-31).

On cross, Dr. Nutik admitted that Claimant had always walked with a limp and that a myelogram taken by Dr. Fortenberry at Pendleton Memorial showed a large defect on the right side of the spinal canal compressing and displacing the sac slightly to the left of flattening the L4-5 root

which was compatible with herniated discs at L4-5 and L5-S1. Dr. Nutik disagreed with Dr. Fortenberry's reading of myelogram but did admit EMG findings showing S1 root involvement. Dr. Nutik also admitted that Dr. Elmorshidy had prescribed use of a cane and that Claimant could have S1 radiculopathy without atrophy and have trouble with prolong sitting. Dr. Nutik limited Claimant as of his last exam to lifting 5 pounds frequently and 15 pounds occasionally, with avoidance of excessive bending and stooping, or ladder climbing, change of position every 15 to 30 minutes, and noted that Claimant was capable of bending on 33 percent of normal. (Tr. 32-44).

D. Suitable Alternative Employment:

In order to establish suitable alternative employment Employer introduced correspondence and reports from Vocational Rehabilitation Counselor, Mr. Douglas A. Kuylen, dated March 10, 1987; May 18, 21, July 7, 10, December 8, 1987; January 27, 1989; and December 26, 2002, and vocational reports from Vocational Rehabilitation Counselor, Ms. J. Carol Murrell, dated July 29, August 16, September 29, December 8, 1988; March 1, April 3, September 27, October 18, December 8, 1989. (EX-8). In his first vocational report dated March 18, 1987, Mr. Kuylen, relying upon Dr. Nutik's January 20, 1987 report finding Claimant capable of lifting 75 pounds, a 10th grade education, and past work experienced listed the following jobs in the light to medium category which Claimant could perform: gas pumping station operator; water treatment plant operator, dump truck driver, car barn laborer, order filler, truck load checker, lubrication equipment servicer, exterminator, gas and oil service, car wash supervisor, and microfilm mounter. (EX-8, pp 2-5). On May 11, 1987, Mr. Kuylen met with Claimant and informed him of several openings as parking garage cashiers paying \$4.50 per hour with no lifting involved. (EX-8, pp. 6-7).

In a letter dated May 21, 1987, Mr. Kuylen informed Claimant's attorney about the availability of parking garage cashiers positions and shuttle bus driver positions at the New Orleans Airport. (EX-8, pp. 8, 9). In June, and July, 1987, Mr. Kuylen informed Claimant about additional openings as delivery drivers, and cashiers. According to Mr. Kuylen, Claimant failed to apply for these jobs, and he (Kuylen), recommended closing Claimant's file.

On July 29, 1988, Ms. Murrell reopened Claimant's file and met with Claimant on August 11, 1988, during which time, Ms. Murrell discussed Claimant's medical history, complaints, and physical limitations. This meeting was followed by additional meetings in August at a work clinic sponsored by Murrell during which Claimant was provided with a resume, underwent a mock interview, and was given two job leads as a packaging and inspection worker (sedentary to light work), paying about \$4.00 to \$4.50 per hour. Ms. Murrell described Claimant's job search as minimal. (EX-8, p. 27). On December 8, 1988, Ms. Murrell wrote Claimant identifying the following jobs as suitable: rag cutter (\$3.35 per hour, sedentary, cutting rags); textile machine operator presser and bundler (\$6.00 per hour, sedentary to light); gate guard (sedentary to light, paying \$3.60 per hour); bridge toll collector (rotating shifts, paying \$4.10 per hour). (EX-8, pp. 29-33).

According to Ms. Murrell, she met with Dr. Haddad on March 30, 1989 during which time Dr. Haddad told her Claimant was capable of full time work if allowed to alternate his activities lifting up to 20 pounds, standing 3 hours sitting 3 hours, walking 2-3 hours and driving an automobile or small truck 3 to 4 hours. Also, according to Ms. Murrell, Dr. Haddad approved the following job for Claimant: rag cutter, parking lot cashier, security watchman, shuttle bus driver, bridge toll collector, parts inspector-sorter, packaging/inspecting worker, textile material marker and textile bundler. (EX-8 p. 43). Ms. Murrell described Claimant as reluctant to participate in job placement efforts. Ms. Murrell closed her file on December 8, 1989 upon instructions from the adjuster. On December 26, 2002, Mr. Kuylen informed Employer's Attorney, Kathleen Charvet, that Claimant could no longer be considered employable considering his age, lack of work since 1985, and current medical restrictions of light to sedentary work. Further, Claimant retired in 1993 and currently has little financial incentive to return to work receiving monthly benefits from Social Security of \$1,235.00, disability retirement of \$743.00 per month, and \$1,159.36 every two weeks in compensation. (EX-8, pp. 56-65).

IV. DISCUSSION

A. Contention of the Parties:

Claimant contends that he reached maximum medical improvement on June 30, 1996 and the primary issue before me is whether he has been permanently and totally disabled since August 1, 2000 when he began treatment with Dr. Phillips. Claimant asserts that there is no question that Claimant has been unable to perform his past longshore work with Employer. Employer was able to establish SAE only in the 1980s through Vocational Experts, Mr. Douglas Kuylen and Ms. Murrell, who identified certain jobs which became unsuitable upon Dr. Phillips' examination of July 31, 2000 of Claimant.¹³

¹³ As of March 18, 1987, Mr. Kuylen, relying upon Dr. Nutik's January 20, 1987 evaluation of Claimant, wherein he found Claimant able to lift 75 pounds, identified the following light to medium jobs: gas pumping station operator, water treatment plant operator, dump truck driver, car barn laborer, order filler, truck load checker, lubrication equipment servicer, exterminator, gas and oil service car wash supervisor mounter. On May 11, 1987 Mr. Kuylen told Claimant of several job openings as parking garage cashiers paying \$4.50 per hour. Mr. Kuylen supplemented this list in June and July, 1987 by including delivery drivers and cashiers. On August 11, 1988, Ms. Murrell provided Claimant with the following jobs in the sedentary to light classification: packaging and inspection workers paying \$4.00 to \$4.50 per hour. This was followed by additional job openings on December 8, 1988 including: rag cutter (\$3.35 per hour); textile machine operator presser and bundler (\$6.00 per hour), gate guard (\$3.60 per hour), bridge toll collector (\$4.10 per hour).

On March 30, 1989, Dr. Haddad informed Ms. Murrell Claimant was capable of full time work if allowed to alternate activities with lifting up to 20 pounds, standing 3 hours, sitting 3 hours,

Employer contends that Claimant has regularly and intentionally thwarted vocational rehabilitation efforts since 1987 and thereafter voluntarily removed himself from the work force when he retired in 1993. Further Claimant is capable of gainful employment within the restrictions set forth by various treating physicians and can perform the jobs it identified. Employer relies heavily upon the medical opinion of non-treating physician, Dr. Nutik who as of November 2002 found Claimant capable of performing sedentary to light work as well as Dr. Horner who treated Claimant from February 28, 1990 to August 24, 1999, who also found Claimant able to do light to sedentary work. Alternatively Employer argues that if Claimant is unemployable it is solely due to his total lack of cooperation with vocational efforts as well as his voluntary withdrawal from the labor market and that as such Claimant is not entitled to permanent and total disability benefits.

B. Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, *reh. denied*, 391 U.S. 929 (1968); Todd Shipyards Corporation v. Donovan, 300 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981).

It has been consistently held that the Act must be construed liberally in favor of the claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). The United States Supreme Court has determined, however, that the “true doubt” rule which resolves factual doubt in favor of a claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556 (d) and that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), *aff’g* 990 F.2d 730 (3rd Cir. 1993).

C. Prima Facie Case

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of

walking 2-3 hours, drive an automobile or small truck 3-4 hours, and approved the following jobs as suitable: rag cutter, parking lot cashier, security watchman, shuttle bus driver, bridge toll collector, parts-inspector-sorter, packaging/inspecting worker, textile material marker and bundler.

employment, or conditions existed at work, which could have caused the harm or pain. Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence that the injury was not caused or aggravated by the employment. Conoco, Inc., v. Director, OWCP, 194 F.3d 684 (5th Cir. 1999); Brown v. Jacksonville Shipyards, Inc., 893 F.3d 294, 297 (11th Cir. 1990). Substantial evidence is that kind of evidence a reasonable mind might accept as adequate to support a conclusion and does not require a "ruling out" standard whereby specific and comprehensive evidence be presented to rule out a causal relationship between a claimant's employment and the injury in question. Conoco 194 F.3d at 690; Noble Drilling v. Drake, 795 F.2d. 478 (5th Cir. 1986).

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Del Vecchio v. Bowers, 296 U.S. 280 (1935); Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1981); Holmes v. Universal Maritime Serv. Corp., 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. Sprague v. Director, OWCP, 688 F.2d 862 (1st Cir. 1982); Holmes, supra; MacDonald v. Trailer Marine Transport Corp., 18 BRBS 259 (1986).

Employer presented no evidence to rebut Claimant's testimony concerning the August 21, 1985 injury. Thus, I find that a Section 20 (a) presumption applies linking Claimant's back injury to his longshore employment with Employer.

D. Nature and Extent of Disability and Date of Maximum Medial Improvement

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968); Seidel v. General Dynamics Corp., 22 BRBS 403, 407 (1989); Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. Hite v. Dresser Guiberson Pumping, 22 BRBS 87, 91 (1989). Care v. Washington Metro Area Transit Authority, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. Lozada v. General Dynamics Corp., 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); Sinclair v. United Food & Commercial Workers, 13 BRBS 148 (1989); Trask v. Lockheed Shipbuilding &

Construction Co., 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

In this case the parties dispute the date of MMI. Claimant asserts June 30, 1996 as the date of MMI, when Dr. Nutik evaluated Claimant for 6th time.¹⁴ As the Board in *Lusby v. Washington Metropolitan Transit Authority*, 13 BRBS 446, 447 (1981) stated: “In some instances, it is difficult to ascertain if claimant’s condition has stabilized; in such cases, however, where a condition has lasted for a lengthy or indefinite duration, as distinguished from one in which recovery awaits a normal healing period, it has been found that claimant’s condition has reached maximum medical improvement and therefore must be described as permanent.” Likewise, the Fifth Circuit in *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654-55 (5th Cir. 1968), reiterated that there were no “hard and fast” rules for determining when an injury was permanent, and a finding that an injury is temporary need not be reached merely because the claimant’s prognosis is that he is likely to get better in the indefinite future.

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, Office of Worker’s Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). Here, Employer concedes that Claimant could no longer perform his former longshore job following the August 22, 1985 injury. Thus, Claimant established a *prima facie* case of total disability following his August 22, 1985, workplace accident.

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996); *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant’s credible subjective testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee’s reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991)(crediting employee’s statement that he would have constant pain in performing another job).

¹⁴ While Employer disputed the date of MMI, it never asserted any date for this event.

An Employer may establish suitable alternative employment retroactively to the day when the Claimant was able to return to work. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540. 542-43 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. See *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

In the present case, I find in accord with Dr. Haddad that Claimant initially reached MMI on March 3, 1988. As of that date, Claimant had been treated conservatively for about 2 ½ years with a stabilization in physical findings and symptoms. As of March 30, 1989, (when Dr. Haddad indicated to Ms. Murrell that Claimant was capable of full time employment lifting up to 20 pounds with alternation of sitting (up to 3 hours), standing (up to 3 hours), walking (2-3 hours)and driving (3-4 hours) activities and approved the following jobs for Claimant: rag cutter (paying \$3.35 per hour), parking lot cashier, security watchmen, (paying \$ 3.60 per hour)shuttle bus driver, bridge toll collector (paying \$4.10 per hour) parts inspector-sorter, packaging/inspecting worker, textile material marker, textile bundler (paying minimum wage). Claimant went from permanent total to permanent partial disability. Ms. Murrell advised Claimant's attorney of these positions on September 27, 1989 and their continued availability paying between \$3.89 and \$5.00 per hour. ¹⁵

Claimant remained at MMI experiencing minimal change in his condition until July 31, 2000, when he saw Dr. Phillips, at which time, Claimant demonstrated an increase in back pain from some to moderate low back pain radiating into the left lower leg and foot with occasional numbness which was aggravated by prolonged sitting and standing. Claimant demonstrated a 25 percent loss of lumbar

¹⁵Although Claimant indicated a willingness to work with Ms. Murrell, Claimant took no steps to do so, resulting in Ms. Murrell closing Claimant's file on December 8, 1989.

motion with moderate bilateral lumbar spasms, tenderness at L4-5 and positive straight leg raising with x-ray evidence of dynamic spondylolisthesis at L4-5, bilateral degenerative arthritis in the hips and traumatic degenerative arthritis in the back. Thereafter, Claimant's condition deteriorated even further with additional loss of motion rendering Claimant unable to do any sustained work.

As of July 31, 2000, the medical records of Drs. Phillips, Watermeier, as well Dr. Nutik, showed Claimant with severe back restrictions. When this is considered in conjunction with the credible testimony of Vocational Expert Mr. Ryan, and Claimant, I find Claimant unable to perform any sustained work, and thus, entitled to permanent and total disability from that date to the present and continuing.

E. SECTION 8 (f) RELIEF

Section 8(f) shifts a portion of the liability for permanent partial and permanent total disability from the employer to the Special Fund established by Section 44 of the Act, when the disability was not due solely to the injury which is the subject of the claim. Section 8(f) is, therefore, invoked in situations where the work-related injury combines with a pre-existing partial disability to result in a greater permanent disability than would have been caused by the injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991). Relief is not available for temporary disability, no matter how severe. *Jenkins v. Kaiser Aluminum & Chemical Sales*, 17 BRBS 183, 187 (1985). Most frequently, where Section 8(f) is applicable, it works to effectively limit the employer's liability to 104 weeks of compensation. Thereafter, the Special Fund makes the compensation payments.

Section 8(f) relief is available to an employer if three requirements are established: (1) that the claimant had a pre-existing permanent disability; (2) that this partial disability was manifest to the employer; and (3) that it rendered the second injury more serious than it otherwise would have been. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309 (D.C. Cir. 1990), *rev'g* 16 BRBS 231 (1984), 22 BRBS 280 (1989). In cases of permanent partial disability the employer must also show that the claimant sustained a new injury, *Jacksonville Shipyards v. Director, OWCP*, 851 F.2d 1314, 1316-17 (11th Cir. 1988) (en banc), and the current disability must be materially and substantially greater than that which would have resulted from the new injury alone. *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884 (5th Cir. 1997); *Director, OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d 303 (5th Cir. 1997). It is the employer's burden to establish the fulfillment of each of the above elements. See *Peterson v. Colombia Marine Lines*, 21 BRBS 299, 304 (1988); *Stokes v. Jacksonville Shipyards*, 18 BRBS 237 (1986).

To show entitlement to Section 8(f) relief, the employer must demonstrate the pre-existing permanent impairment was manifested to the employer. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309 (D.C. Cir. 1990). To meet this requirement, the employer must have actual knowledge of the pre-existing condition, or there must be medical records in existence from which the condition was objectively determinable. *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS

142, 147 (1997), citing *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996). Medical records need not indicate the severity of precise nature of the pre-existing conditions, and the medical records will satisfy the “manifest” requirement if they contain “sufficient and unambiguous information regarding the existence of a serious lasting physical problem.” *Id.* citing *Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74 (1st Cir. 1988).

The First Circuit in *Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 83 (1st Cir. 1992) upheld a determination by the Board that a pre-existing permanent partial impairment need not be “permanent” at the time of the second injury to grant an employer Section 8(f) relief, as long as the pre-existing condition was of a serious and lasting nature. The claimant, Lockheart, injured his back on March 27, 1998, was diagnosed by the employer’s physician as having muscle spasm, was returned to light duty work on April 25, and he continued to complain of pain. *Id.* at 76. On May 1, 1978, Lockheart experienced a second back injury and he suffered a ruptured disc. *Id.* In addressing the Director’s argument at Lockheart’s March 27, 1978 injury was not permanent at the time of his May 1, 1978 injury, the First Circuit explained:

The Director proposes that we adopt the first ALJ’s holding that the manifest requirement is not fulfilled when an employer does not know with absolute certainty that the disability is permanent. If we adopted this position, an employer would be required to know without a doubt, or have medical records conclusively indicating, that the disability was permanent. Such a rule would severely restrict the coverage of Section 8(f) and conflict with the purposes of the manifest requirement and of Section 8(f) itself. To deny limited liability to all employers who, at the early stage of a disabling injury, are not 100% certain that it will be permanent would exclude even those employers who have a strong incentive to discriminate. For example, under the Director’s proposed rule an employer who knew that a worker had sustained a disabling knee injury and had substantial, but not yet conclusive, information that the knee condition was permanent would fail to meet the manifest requirement and thus be ineligible for Section 8(f) relief. However, the uncertain employer would have had as much a financial incentive to fire the worker with the weak knee as the employer who knew conclusively that the knee was permanently weakened. Awarding limited liability under Section 8(f) to the latter but denying it to the former would severely restrict the availability of Section 8(f) relief in a manner inconsistent with the purposes of the manifest requirement and Section 8(f). In many circumstances, it is impossible until years have passed to definitively determine whether an injury has caused permanent damage.

Director, OWCP v. General Dynamics Corp., 980 F.2d 74, 83 (1st Cir. 1992) (citations omitted).

In establishing the occurrence of a second injury to the employee, it has been clearly established that a work-related aggravation of an existing injury constitutes a compensable injury for purposes of section 8(f). *Ashley v. Tide Shipyard Corp.*, 10 BRBS 42, 44 (1978); *Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir. 1991), *aff’g* 22 BRBS 453 (1989).

However, there must be a showing of actual aggravation. If the results are nothing more than a natural progression of the preexisting condition, it cannot constitute the required second injury. *Jacksonville Shipyards v. Director, OWCP*, 851 F.2d 1314, 1316-17 (11th Cir. 1988) (en banc), *aff'g Stokes v. Jacksonville Shipyards*, 18 BRBS 237 (1986); *Souza v. Hilo Transportation & Terminal Co.*, 11 BRBS 218, 223 (1979). Additionally, the Board has upheld the denial of Special Fund relief where the ALJ has found the aggravation too minimal to have contributed to the employee's ultimate disability. *Stokes*, 18 BRBS at 241. Claimant clearly sustained a subsequent injury when he injured his leg, causing an altered gait, which lead directly to the aggravation of his pre-existing back impairment.

To establish the contribution element Employer must show by substantial evidence that Claimant's ultimate permanent partial disability was not due solely to the work injury, but in fact, was materially and substantially greater due to Claimant's pre-existing disability. 33 U.S.C. § 908 (f)(1) (2001); *Director, OWCP v. Ingalls Shipbuilding, Inc. [Ladner]*, 125 F.3d 303 (5th Cir. 1997). Employer must offer some proof of the extent of the permanent partial disability had the pre-existing injury never existed so that the Administrative Law Judge may determine if Claimant's permanent partial disability is materially and substantially greater due to the pre-existing disability. *Id.* at 308. The Board further noted that the Administrative Law Judge may resolve the inquiry "by inferences based on such factors as perceived severity of pre-existing disabilities and the current employment injury, as well as the strength of the relationship between them." *Id.* at 307; *Ceres Marine Terminal v. Director OWCP [Allred]*, 118 F.3d 387, 391 (5th Cir. 1997).

In *Ceres*, 118 F.3d at 391, the Fifth Circuit specifically declined "to adopt a rule that would require a rote recitation of the applicable legal standard" under Section 8(f). Rather, "the fact finder's inquiry must of necessity be resolved by inferences based on such factors as the perceived severity of the pre-existing disabilities and the current employment injury, as well as the relationship between them." *Id.* In *Ceres*, the court upheld the ALJ's determination that the claimant's, Allred's, "pre-existing disabilities, combined with his employment injury to produce a greater disability than would have occurred in the absence of the pre-existing disabilities." *Id.* at 390. Allred had suffered relatively minor injuries to his shoulder and neck, *id.* at 389, that overlaid a pre-existing back condition, hypertension, diabetes and severe arm, elbow, neck and shoulder injuries. *Id.* at 390-91 n.2. A physician opined that Allred's current impairment was mainly a result of his pre-existing condition which "superimposed on and combined with" the employment.

In the present case, Employer has apparently abandoned its request for Section 8 (f) relief in that there is no mention of such in its brief. Moreover, there is no evidence of any pre-existing permanent partial disability. Rather, there appears to be only an August 22, 1985 injury which over the course of time has deteriorated to the point that Claimant, as of Dr. Phillips examination in August, 2000, was unable to perform any work on a sustained and continuing basis.

F. INTEREST AND ATTORNEY FEES

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., *aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's Counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing findings of fact, conclusions of law, and the entire record, I enter the following order.

1. Employer shall pay to Claimant permanent total disability benefits pursuant to 33 U.S. C. § 908(a) of the Act for the period from August 1, 2000 to present and continuing based on an average weekly wage of \$1,144.12 with a corresponding weekly compensation rate of \$762.75.
2. Employer shall received a credit for all compensation paid to Claimant since August 1, 2000.
3. Employer's application for Section 8(f) relief is denied.

4. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. § 1961.

5. Claimant's Counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objections thereto.

A

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE